

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR System
in the 800 MHz Frequency Band

PR Docket No. 93-144

RM-8117, RM-8030,
RM-8029

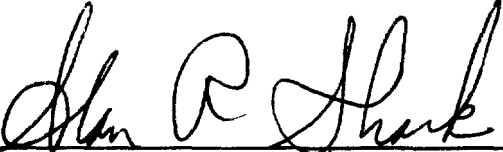
To: The Commission

REPLY COMMENTS
OF THE
AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

Respectfully submitted,

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SUMMARY

The Commission's proposal to implement a wide-area SMR licensing scheme drew widespread support from the wireless communications community. AMTA believes that the record in this proceeding supports an MTA market definition for EMSP systems; a two-step licensing process with preferences for existing operators in the area; more stringent application criteria to ensure the participation only of fully qualified parties; and appropriate sanctions for failure to construct fully.

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WASHINGTON, D.C. 20541

The American Mobile Telecommunications Association Inc. ("AMTA" or Association") respectfully submits its Reply Comments in the above-entitled proceeding.¹ The volume of the comments filed in response to the Notice confirms a compelling interest in FCC adoption of a wide-area SMR licensing scheme. To the extent that those comments also contain useful recommendations which will advance the FCC's objectives, the Association assumes they will be given thoughtful consideration. AMTA is equally confident the FCC can distinguish those positions from ones proffered by interests currently or prospectively competitive with SMR and EMSP systems which appear uniquely intended to maintain or establish a regulatory advantage in relating to them. Only policies which advance the public, rather than private, interests should be considered in the Commission's decision-making process.

I. OVERVIEW

The number of comments submitted by interested parties in this proceeding, as well as the level of detail devoted to specific issues, confirm AMTA's conviction that there is substantial interest in the development of an 800 MHz wide-area EMSP licensing scheme. In general, the participating parties support the EMSP licensing concept as consistent with the public's interest in the availability of ubiquitous, seamless, wireless communications capability.² They agree that the current SMR regulatory structure

¹ Notice of Proposed Rule Making, PR Docket No. 93-144, __ FCC Rcd __ (released June 9, 1993) ("Notice").

² PowerSpectrum, Inc, ("PSI") urges the FCC to delay action in this proceeding pending adoption of rules for 900 MHz wide-area systems as contemplated in PR Docket No. 89-553, and to reconcile any regulatory distinctions between the two plans. AMTA is puzzled by PSI's timing concern since the 900 MHz docket is already substantially ahead of the instant proceeding. It nonetheless opposes any recommendation that the two necessarily be considered

is not conducive to the licensing and implementation of the wide-area systems desired by the public and SMR providers. Adoption of rules along the lines of those proposed in the Notice will relieve the Commission and the industry of the unnecessarily cumbersome, as well as time- and resource-consuming, process used to authorize wide-area SMR systems under the current FCC policies.

There is less than full agreement, however, regarding specific recommendations in the Notice. In particular, there is a relatively sharp, albeit not surprising, division of opinion regarding the proposed eligibility criteria, and EMSP market size and definition. Differing opinions regarding the type of frequencies to be included in EMSP authorizations as well as application ingredients and implementation criteria will also need to be resolved.

II. DISCUSSION

A. Wide-Area SMR Authorization Definition

The Notice proposed to authorize EMSP systems within defined geographic areas, an approach consistent with that recommended in AMTA's Blueprint.³ The FCC suggested that a BTA or MTA market definition would be preferable, but requested comments on an MSA/RSA, LATA, Regional Bell Operating Company area, or applicant-defined approach.

in tandem, or that the regulatory structures adopted be identical. There are differences in the 800 MHz and 900 MHz SMR environments which may be reflected in both the timing of the FCC's action in each proceeding and the substantive decisions reached.

³ See, AMTA's Petition for Rule Making, RM-8117, filed October 26, 1992.

AMTA supported an MTA market definition as optimal, as did several SMR operators which have already evaluated the feasibility of and made a serious commitment to the implementation of wide-area SMR systems.⁴ Parties recommending the use of BTA boundaries, or even MSA/RSA delineations, suggested that smaller market areas would enhance competitive opportunities and increase the likelihood of ubiquitous EMSP implementation.⁵

AMTA is not persuaded by the arguments advanced to support smaller market regions, particularly those arguments which rely on the cellular experience as the basis for the approach. If anything, the rapid consolidation of the cellular industry is persuasive evidence that a smaller market definition primarily benefitted those fortunate enough to have been selected as licensees in the MSA and RSA lotteries. An extremely large percentage of such systems have been acquired by, are significantly controlled by, or are managed by the operator in the largest neighboring MSA. The cost of implementing cellular systems quickly make it apparent that stand-alone operations serving relatively lightly populated areas were typically not economically rational. A truly nationwide cellular system is not being built out by a series of independent, smaller entities each serving its discrete MSA or RSA. It is being implemented as operators in the major markets determine it is economically and operationally prudent to

⁴ See, Comments of Dial Page, Inc. and Flee Call, Inc.

⁵ See, e.g., Comments of GTE Service Corporation ("GTE"), PacTel Paging ("PacTel") and Southwestern Bell Corporation ("SBC").

expand from the urban cores to more rural areas.⁶

In this respect, the cellular experience is indeed illustrative. There are approximately 750 MSAs and RSAs with two operators in each market for a total of some 1500 potential cellular operators. In fact, there are approximately 400 operators, roughly half of which operate only a single system. Thus, 200 entities operate the other 1300 cellular systems. Mc Caw alone operates in 140 markets.

AMTA does not suggest that this pattern of consolidation is improper or antithetical to the public interest. However, that experience does support the Association's contention that the optimal market area for wireless communication is substantially larger than the MSA/RSAs or even the BTAs. The cellular industry's natural gravitation to broader coverage, and the costs associated with market consolidation, should be recognized in this proceeding by adoption of an MTA market definition for EMSP systems.⁷

Moreover, adoption of an MTA licensing approach will not preclude a continued level of competition within the SMR industry itself. There is already a thriving, vigorously competitive "traditional" SMR environment. A significant number of those

⁶ Minimal cellular construction requirements can be satisfied by individual licensees at a comparably minimal cost. Full system implementation can then be undertaken by the acquiring party.

⁷ It could be assumed that cellular interests support smaller market areas for EMSP licensees, as they have for PCS systems, for competitive rather than public interest reasons. To the extent that the FCC wishes to encourage actual competition in the wide-area wireless marketplace, it must ensure a level playing field by authorizing systems of comparable market size.

system providers will undoubtedly elect to continue operating their businesses rather than join or sell to an EMSP entity. Unlike cellular licensees in smaller markets, these operators have already implemented their systems and often enjoy a healthy cash flow which will permit them to remain independent. They exist in major urban areas and the most rural parts of the country and will continue to provide a valuable, cost efficient service to a large number of customers.

Other parties have recommended that the FCC adopt an alternative approach presented in the Notice whereby EMSP applicants would self-define their markets based on the geographic area over which they are already providing service.⁸ This approach would be consistent with the Commission's current policy of defining wide-area "footprints."

As described in its Comments, AMTA does not disagree that self-defined market areas would be advantageous for EMSP applicants. The Association has not supported that approach because neither the FCC nor the parties recommending it have addressed the problem of creating "daisy chains" of mutually exclusive applications with the attendant delays in processing. Given the current intensive SMR frequency use and reuse on the Eastern Seaboard, it is not difficult to predict an interlocking series of mutually exclusive applications from Bangor to Key West. Negotiations between and among such a significant number of

⁸ See Comments of the National Association of Business and Educational Radio, Inc. ("NABER") and E. F. Johnson Company ("EFJ").

parties, each with a different number and scope of mutual exclusivity situations, would not likely prove productive. The Commission would be left to sort out a problem which it has assiduously avoided in recent years by accepting applications on a distinct market-by-market basis. Thus, while AMTA encourages the proponents of this approach to develop a solution to that problem, and would likely support any demonstrably viable resolution, it cannot recommend self-defined EMSP markets for that reason.

In addition to the geographic area covered, an EMSP authorization will be defined by the frequencies available for inclusion in the license. The FCC proposed to limit EMSP licenses to SMR Pool frequencies, and possibly General Category Channels. SMRs currently authorized to use Business or Industrial/Land Transportation Pool frequencies would be permitted to continue using them in the EMSP system at the already authorized site, but would not be able to reuse them at additional locations throughout the market.

AMTA supported the inclusion of only SMR and General Category frequencies as a reasonable balancing of interests between EMSP operators and entities primarily eligible for other Pool frequencies. In the Association's opinion, EMSP licensees in spectrum deficient markets should be encouraged to satisfy capacity requirements by adopting advanced technologies with greater spectrum efficiency. A combination of improved technology and reasonable spectrum resources should be satisfactory to meet those needs.

A few parties argued that EMSP licensees should relinquish their authorizations to continue using non-SMR channels, and return them to the pool of available spectrum.⁹ The Association opposes that recommendation as inconsistent with the demonstrated demands of today's marketplace, and with the anticipated need for greater spectrum availability for EMSP systems in the same geographic areas where SMR user demand has already justified the use of inter-category channels. If, in the future, the FCC determines that there is a spectrum imbalance among these classes of eligibles, it can address that matter based on documented usage information.

However, AMTA is also not persuaded to support NABER's recommendation that all Pool frequencies be available for reuse throughout an EMSP system. As stated in its Comments, the Association believes that inter-category spectrum should continue to be available for those primarily eligible to use it, as well as for expansion capacity on fully loaded, traditional SMR systems. Adoption of NABER's proposal could result in the unavailability of all Pool frequencies, except Public Safety frequencies, for use by Business and Industrial/Land Transportation eligibles or traditional SMR licensees. That would not be consistent with the public interest or with the interest of many of NABER's own constituents.

B. EMSP Eligibility Criteria

In its Notice, the Commission proposed a two-stage EMSP

⁹ See Comments of the Associated Public-Safety Communications Officers, Inc. ("APCO") and the Utilities Telecommunications Council ("UTC").

application process. Eligibility for the initial round would be limited to entities holding SMR licenses within the relevant geographic area as of May 3, 1993 which are constructed by the EMSP filing date. The second round would be open to all parties except less than fully constructed EMSP licensees which had already been authorized for at least 42 channels.

AMTA supported that aspect of the Notice as consistent with the Blueprint proposal. Most SMR operators and organizations representing SMR interests concurred.¹⁰ Like the FCC, those parties determined that existing licensees could bring service to the public on an expeditious and cost-efficient basis. Not surprisingly, entities which do not currently hold SMR authorizations opposed a preference for existing licensees.¹¹

AMTA recognizes the FCC's general position that the marketplace is best served by access to a broad range of fully qualified service providers selected without reference to past accomplishments. Many successful communications enterprises, and some of the most creative communications concepts, have come from new entrants in the telecommunications marketplace.

This policy must be balanced, of course, against the Commission's statutory obligation to make available to the public rapid, efficient and reasonably priced communications service. 47 U.S.C. §1. When that overriding goal will be accomplished by

¹⁰ See, e.g., Comments of Dial Page, EFJ, and NABER.

¹¹ See Comments of SBC, UTC, and Bell South Corporation ("BSC").

establishing preferences among prospective applicants, the FCC may properly adopt such rules.

In this proceeding, the FCC has stated its objective as follows: "Our goal is to ease the current transition to wide-area networks for both small and large licensees, and to efficiently license systems offering advanced technologies now and in the future." Notice ¶9. Its two-stage licensing proposal does not foreclose the possibility of new entrants. Rather it recognizes the fact that the 800 MHz landscape is already heavily populated by a variety of system operators whose stations are scattered throughout geographic areas without regard to MSA, RSA, LATA or MTA boundaries, and with random frequencies assigned at each site. This is unlike the cellular MSA/RSA scenario in which the parameters of all existing service areas were precisely defined and both licensees in each market had essentially identical authorizations. Neither was providing cellular service on any of their channels in the adjacent RSA because no one was yet authorized to do so. While it might have been efficacious to award preferences even in that situation, the failure to have done so in the cellular arena should not dictate the FCC's decision in the instant proceeding.

Whether the Commission defines EMSP markets by MTAs, BTAs or even MSAs, there are already SMR licensees in those areas, typically clustered around the population centers. They are optimally positioned to provide the coverage desired by the FCC on an expedited basis by building upon their existing infrastructure

and customer base. If they are unwilling or incapable of implementing an EMSP system, their frequencies will remain available throughout the rest of that area for new entrants.

A number of wireline cellular operators have also urged the FCC to use this proceeding as a vehicle for modifying or abandoning the prohibition against such entities holding SMR licenses.¹² As those parties are aware, that issue is squarely before the FCC on reconsideration and pending in the courts.¹³ AMTA is confident that the Commission will consider the matter fully and fairly based on all record evidence before the agency, and resolve it in a timely fashion.

C. EMSP Application Processing

Despite certain differences of opinion regarding which entities should be eligible to request EMSP licenses and at what stage, there was a commonly shared concern that more stringent application criteria should be applied. For example, SBC advocated that only "qualified" applicants be considered in lotteries or permitted to participate in auctions.¹⁴ The Association might not support all of the criteria SBC posited as determinative, *i.e.* financial viability, technical expertise, managerial experience, and a verifiable commitment to provide the proposed service, and questions at what point such an analysis might effectively

¹² See, *e.g.*, Comments of Bell South, GTE, PacTel and SBC.

¹³ Order, PR Docket No. 86-3, 7 FCC Rcd. 4398 (1992), pets. for recon. pending; pet. for review pending sub nom. BellSouth Corp. v. FCC, No. 92-1334 (D.C. Cir).

¹⁴ SBC Comments pp. 17-18.

constitute a comparative hearing. Nonetheless, AMTA concurs fully with the concern underlying SBC's proposal; that the process of selecting EMSP licensees not be manipulated by speculators for private economic benefit.

It was precisely this concern that prompted AMTA to recommend more stringent application standards in its Comments. Specifically, it proposed the submission of site specific system designs at the application stage and a pre-lottery or auction demonstration of financial capability. The Association's approach was intended to winnow out applicants incapable of satisfying the proposed construction requirements because of a technical inability to cover the necessary population centers and a lack of financial resources to serve the alternative geographic area. In AMTA's opinion, otherwise eligible applicants which are able to demonstrate that they can satisfy those criteria should be included in the negotiation and selection process. Those that cannot should be discouraged from filing and culled out at the earliest opportunity.

D. Post-Licensing EMSP Requirements

A majority of parties, including AMTA, supported the Notice's proposal requiring EMSP systems to cover 80% of the population or land area within the relevant market.¹⁵ Although a small number of commentors recommended intermediate construction benchmarks to monitor construction progress, similar to those

¹⁵ See, e.g., Comments of Dial Page, Fleet Call, PacTel, SBC and UTC.

adopted for nationwide 220 MHz licensees,¹⁶ the Association remains convinced that benchmarks will not be needed if licensees are required to post a performance bond or fund an escrow account for the entire cost of satisfying the construction requirement. This assumes, of course, that the FCC can legally impose such a requirement. Because there is some uncertainty regarding this point, PacTel proposed the use of a "forfeiture bond" instead. As the Association understands that proposal, the bond amount would be dictated by the FCC's existing forfeiture guidelines rather than the applicant's estimated construction costs. The failure to construct some or all authorized facilities would trigger a per station forfeiture in that pre-determined amount. AMTA would support that approach if it were determined to be more legally defensible than the proposal in the Notice.

AMTA does not endorse PacTel's suggestion that additional penalties be imposed for failure to construct fully, over and above the forfeiture bond. Claiming that licensees might otherwise "cherry pick" which facilities to construct, PacTel itemized a menu of sanctions from which the Commission should select.¹⁷

AMTA does not believe that the approach recommended by PacTel is necessary. EMSP licensees, like cellular operators, will have every economic incentive to provide as ubiquitous a service as the marketplace will support. An EMSP licensee who elects not to construct a specific facility has presumably determined that it is

¹⁶ See, Comments of PacTel and UTC.

¹⁷ PacTel Comments, pp. 13-4.

not needed to satisfy customer requirements. AMTA fully supports an appropriate monetary forfeiture under those circumstances in recognition of the fact that no other party was permitted to use those frequencies in that specific area during the permitted construction period. It does not endorse a system with sanctions so severe as to prompt construction of unneeded, uneconomical stations.

Finally, AMTA tentatively supports Fleet Call's suggestion that EMSP systems be limited to a 40 dBu signal strength at the border, rather than the 22 dBu proposed in the Notice.¹⁸ The Association is currently analyzing the information presented in Fleet Call's comments. If that company is correct in asserting that the limitation proposed will adversely affect EMSP service quality near market boundaries, and assuming the rules impose equal coordination obligations on EMSP licensees in adjacent markets, irrespective of when the systems were authorized or constructed, the border signal strength limitation should be modified as proposed.

III. CONCLUSION

There is a clear consensus among interested parties that the Commission should adopt rules which will permit the rapid deployment of wide-area EMSP systems. AMTA urges the Commission to proceed expeditiously in finalizing such regulations consistent with the comments provided herein.

¹⁸ Fleet Call Comments, pp. 19-22. AMTA assumes that these provisions will always be subject to full co-channel protection to existing non-EMSP systems whether inside or outside of the MTA.

CERTIFICATE OF SERVICE

I, Joanna H. Brown, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify, that I have on this 5th day of August, 1993 placed in the U.S. mail, postage prepaid, a copy of the foregoing **REPLY COMMENTS** to the following:

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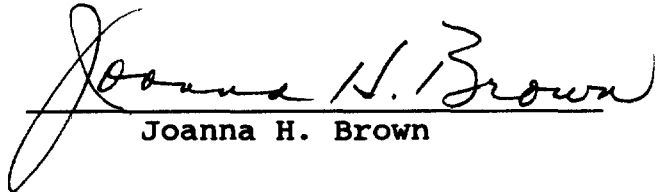
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